

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

J. M. MARTINAC )  
SHIPBUILDING, CORPORATION, )

PCHB NO. 91-46

Appellant, )

v )

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )

Respondent, )

and )

PUGET SOUND WATER  
QUALITY AUTHORITY, )

Intervenor. )

This matter came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Harold S. Zimmerman, Chairman; Annette S. McGee and Judith A. Bendor. Judith A. Bendor was succeeded on the Board by Robert V. Jensen, who has considered the record in this matter.

The matter is the appeal of a National Pollutant Discharge Elimination System (NDPES) permit by the permittee, J. M. Martinac Shipbuilding Corporation.

Appearances were as follows:

1. Appellant J. M. Martinac Shipbuilding Corporation appeared by Charles K. Douthwaite and Jean A. Kingrey of the firm of Eisenhower and Carlson.

2. Respondent State of Washington Department of Ecology appeared by

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(1)

1 Ronald L. Lavigne, Assistant Attorney General. Intervenor Puget Sound Water Quality  
2 Authority did not appear.

3 The trial was conducted at Lacey, Washington on April 21 and 22, 1992. Gene Barker  
4 and Associates provided court reporting services. Witnesses were sworn and testified. Exhibits  
5 were examined Post trial briefs and motions were filed. The last of these was filed on  
6 June 29, 1992.

### 7 MOTION RULINGS

8 Respondent, Department of Ecology moved for dismissal at the conclusion of  
9 appellant's case. The motion was taken under advisement. It is now denied. After  
10 completion of the trial Ecology moved for dismissal on grounds that appellant's offer of proof  
11 was prejudiced. The contents of the offer of proof were excluded from evidence, were not  
12 considered in the deposition of this matter and did not result in prejudice. The motion is  
13 denied.

14 Having so ruled and from testimony heard and exhibits examined, the Pollution Control  
15 Hearings Board makes these

### 16 FINDINGS OF FACT

#### 17 I

18 Appellant J. M. Martinac Shipbuilding Corporation (hereafter "Martinac") is a  
19 Washington Corporation with operations at 401 East 15th Street in the City of Tacoma,  
20 Washington. Martinac's principal business is construction of new marine vessels. In recent  
21 years, Martinac has constructed tuna seiners, tugs and smaller patrol craft for the U.S. Navy.  
22 Martinac also has a much smaller ship repair line of business conducted at the same site.  
23 Martinac has conducted operations at that site since 1924. Martinac is a family-owned  
24

7  
1 business; the current President, Mr. Joseph M. Martinac, Jr., is founder J. M. Martinac's  
2 grandson.

## 3 II

4 The Department of Ecology (hereafter "Ecology") issued NPDES Permit No  
5 WA-004028-2 to Martinac January 30, 1991. Ecology has not previously issued an NPDES  
6 Permit to Martinac.

## 7 III

8 Martinac's facility consists of an upland operation, two covered "marine ways" which  
9 extend from the upland areas through a tidal zone to open water on Thea Foss (formerly City)  
10 Waterway, and numerous docks extending over Thea Foss Waterway.

## 11 IV

12 Martinac submitted an application for its NPDES Permit at Ecology's request. Ecology  
13 requested that Martinac submit a permit application in order to regulate stormwater discharges  
14 from Martinac's facility. Martinac discharges to the tidelands draining to Thea Foss  
15 Waterway. There are some 74 point source discharges on the waterway. Martinac has three  
16 of them.

## 17 V

18 Stormwater which falls on Martinac's property is drained through a drainage system  
19 including catch basins, three underground drainage lines and three outfalls. The outfalls are  
20 referred to as numbers 001, 002 and 003. Martinac contributes less than 0.1% of the  
21 stormwater discharged to the Thea Foss Waterway.

## 22 VI

23 NPDES Permit No. WA-004028-2 placed effluent limitations on stormwater drained  
24 through Martinac's outfalls 001, 002 and 003.

The limitations include, in part:

<u>Parameter</u>	<u>Monthly Average</u>
Oil and greases	10 mg/L
Total suspended solids	45 mg/L
Flow	NA
pH	NA
<u>Daily Maximum</u>	
Cadmium	43 ug/L
Copper	2.9 ug/L (25)
Chromium (+6)	1,100 ug/L
Lead	140 ug/L
Mercury	2.1 ug/L (0.2)
Nickel	75 ug/L (40)
Zinc	95 ug/L

(Footnotes omitted.) The metals are to be measured as "total recoverable". The values in parentheses following effluent limitations for copper, lead and nickel were explained as a "functional limit" for those pollutants based on an analytical detection limit established as contract required detection limit by the U. S. Environmental Protection Agency.

#### VII

The effluent limits on oil and grease and total suspended solids were based on Ecology's judgment of the likely effect of "best management practices" (or BMPs) to be employed at Martinac. The parties agree that the oil and grease and total suspended solids effluent limitations are, therefore, technology-based effluent limitations.

#### VIII

Ecology has not identified the Thea Foss Waterway as a water quality limited segment within the meaning of 40 CFR 130. Ecology has not prepared a total maximum daily load analysis for metals in the Thea Foss Waterway.

IX

Ecology does not contend that the effluent limits for metals represent "all best known, available and reasonable methods of treatment", a state legal formula describing a technology-based effluent limitation.

X

Ecology contends that the effluent limitations on metals in Martinac's permit are water quality-based limitations.

XI

Martinac has collected a substantial amount of data describing the concentrations of chemicals in stormwater discharged through outfalls 001, 002, and 003. Martinac collected data on concentrations of oil and grease, total suspended solids and pH, as well as cadmium, copper, chromium, lead, mercury, nickel and zinc. This data has been submitted to the Department of Ecology. In general, Martinac has met or bettered its effluent limitations except for copper and zinc. Over the 14-month period for which data is available, Martinac generally exceeded the permit effluent limitations on copper and zinc.

XII

The sandblasting grit used by Martinac for removing paint from ships contains copper and zinc. A steel grit is available but would require working indoors as rain would rust the steel grit. Currently Martinac applies sandblasting grit outdoors using tarps to contain the grit. While the copper level in Martinac's stormwater discharge does not correlate to sandblasting activity, it is probable that the residual grit is a source of the copper and zinc in that stormwater discharge.

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2 XIII

3 Martinac also employs paints containing zinc. Metals stored in the yard may also  
4 contain zinc. It is probable that residual paint and metal is a source of the zinc in Martinac's  
5 stormwater discharge.

6 XIV

7 Martinac urges that copper and zinc may be airborne in industrial areas and brought to  
8 earth by rainfall. There has been, however, no sampling of rainwater to advance this theory  
9 beyond speculation.

10 XV

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

12 From these Findings of Fact, the Board issues these:

13 CONCLUSIONS OF LAW

14 I

15 The Board has jurisdiction over these persons in these matters. RCW 43.21B.310.

16 II

17 Ecology has two legal bases for effluent limitations in NPDES permits, i.e., the  
18 effluent limitations may be technology-based or water quality-based. There appears to be no  
19 contest in this case over the oil and grease and total suspended solids effluent limitations.  
20 These limitations were agreed by both sides to be technology-based.

21 III

22 There was considerable disagreement over effluent limitations on metals which Ecology  
23 contended were water quality-based. Ecology did not perform an analysis adequate under  
24 AKART or under 40 CFR 125.3 to establish its metals limitations in Martinac's Permit as

1 technology-based effluent limitations. The question, thus, becomes whether those limitations  
2 were shown to be water quality-based limitations.

3  
4 IV

5 Ecology's NPDES permit program regulations, at WAC 173-220-130, authorize  
6 Ecology to include water quality-based effluent limitations under limited circumstances.  
7 WAC 173-220-130(1)(a) provides that Ecology, in issuing a permit, shall apply, whenever  
8 applicable, all known, available and reasonable methods of treatment, and pursuant to  
9 WAC 173-220-130(1)(b):

10 *Any more stringent limitation, including those necessary to:*

11 *(iii) Implement any applicable water quality standards; such*  
12 *limitations to include any legally applicable requirements necessary to*  
13 *implement total maximum daily loads established pursuant to section*  
14 *303(d) and incorporated in the continuing planning process approved*  
*under section 303(e) of the FWPCA and any regulations and guidelines*  
*issued pursuant thereto.*

15 WAC 173-220-130(1)(b)(iii).

16  
17 V

18 In this case, the effluent limitations at issue are those for metals, particularly copper  
19 and zinc. There is no evidence to support compliance with WAC 173-220-130(1)(b)(iii) in the  
20 setting of these limitations. Specifically, Ecology has not designated the Thea Foss Waterway  
21 as water quality limited, that is, a place where technology-based limitations and other methods  
22 of control will not be adequate to implement any applicable water quality standard. 40 CFR  
23 130.7(b)(1). If the Thea Foss Waterway were so designated, a total maximum daily load  
24 (TMDL) and a waste allocation to dischargers would be necessary. See 40 CFR 130.7(c)(1).

1 The waste load allocation for the pollutant (e.g. copper and zinc) then serves as the basis for  
2 the water quality based effluent limitation for a specific plant. The copper and zinc limitations  
3 in this matter were not set in compliance with WAC 173-220-130(1)(b)(iii) or Federal Waater  
4 Pollution Control Act (FWPCA) § 303(d).

## 5 VI

6 Ecology has urged in support of the copper and zinc limitations that FWPCA §§ 301  
7 and 302 provide authority to establish water quality-based limitations, free of the provisions of  
8 § 303(d) discussed above. We disagree. Nothing in the text of §§ 301 or 302 suggests that  
9 § 303(d) may be set aside.

## 10 VII

11 Martinac contends that Ecology has exceeded its authority to require AKART by  
12 deciding not to include an upset defense in Martinac's permit.

13 While federal regulations provide for an upset defense, 40 CFR § 122.41(n), federal  
14 regulations also provide that a state may adopt or enforce requirements which are more  
15 stringent than federal requirements. 40 CFR § 123.1(i). Federal courts have specifically ruled  
16 that a state is not obligated to insert the upset defense in a state-issued NPDES permit.  
17 Sierra Club v. Union Oil Company of California, 813 F.2d 1480 (9th Cir. 1987).

18 Consequently, there is nothing in federal law which mandates the inclusion of an upset defense  
19 in Martinac's permit. Neither has any such state law been cited.

20 We conclude Ecology did not exceed its authority by deciding not to include an upset  
21 defense in this permit.

## 22 VIII

23 Martinac argues it is inappropriate for Ecology to require metals to be measured as  
24 "total recoverable" because "all forms [of metal] are not equally toxic." Appellant's Post-  
25

1 Hearing Brief at pp. 6-7. However, federal law requires that "[a]ll permit effluent limitations,  
2 standards, or prohibitions for a metal shall be expressed in terms of "total recoverable  
3 metal[.]" 40 CFR § 122.45(c). The federal regulation does provide exceptions to the use of  
4 the "total recoverable" method, but none of those exceptions are applicable here. We conclude  
5 that measurement of "total recoverable" metal is appropriate.  
6

7 IX

8 Martinac has challenged the acute toxicity testing of its stormwater. The legislature has  
9 directed, however, that permit conditions control toxicants in wastewater discharge.  
10 RCW 90.48.520. One of the conditions the legislature identified is "limits on the overall  
11 toxicity of the effluent." Id. The legislature has specifically directed that, "[t]he toxicity of  
12 the effluent shall be determined by techniques such as chronic or acute bioassays." Id. We  
13 conclude that the required acute toxicity testing is appropriate.

14 X

15 Martinac challenges the testing schedule for metals in condition S2 of the permit. We  
16 have concluded that the water quality based effluent limitations in this case were not set in  
17 compliance with law (Conclusion of Law V, supra). That should not suggest, however, that  
18 the metals discharged by Martinac to the public waters are not a legitimate source of public  
19 concern. We note, for example, RCW 90.48.520, which grants the Department of Ecology,  
20 the authority to take enforcement actions to ensure that "no . . . discharge of toxicants be  
21 allowed that would violate any water quality standard . . . ." Similarly, RCW 90.48.080  
22 makes it unlawful for any person to allow a discharge which would "cause or tend to cause  
23 pollution" of the waters of the state, "according to the determination of the department." For  
24 the purpose of collecting information pursuant to this remand, the monitoring requirement of  
25 permit condition S2 should be sustained. See FWPCA § 308.

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2 XI

3 We have carefully considered the other contentions raised by appellant and find them to  
4 be without merit.

5 XII

6 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

7 From the foregoing, the Board issues this:  
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ORDER

The effluent limitations pertaining to metals in Condition S1 of the permit are hereby reversed and remanded for action in accordance with this decision. The permit is otherwise affirmed.

DONE this 22<sup>nd</sup> day of September, 1992.

William A. Harrison  
HONORABLE WILLIAM A. HARRISON  
Administrative Appeals Judge

STATE OF WASHINGTON  
POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee  
ANNETTE S. MCGEE, Member

Robert V. Jensen  
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